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No. 96-1210

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

APRIL BRANNAN,
Respondent.

On Petition for a Writ of Certiorari to the United States of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSTION

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QUESTION PRESENTED

Whether a nonprofit corporation contracting with the Federeal Government to, among other things, collect defaulted student loans, should be treated as a governmental entity exempt from the consumer protections provided in the Federal Fair Debt Collection Practices Act. 15 USC 1692 et seq. (FDCPA)

PARTIES TO THE PROCEEDING

The Petitioner is United Student Aid Funds, Inc. ("USA Funds").

The Respondent is April Brannan.

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OPINIONS BELOW

District Court

The District Court rendered Summary Judgment in favor of USA Funds on April Brannan's (Brannan) FDCPA claim finding that congress did not intend the FDCPA to apply to nonprofit corporations contracting with the Department of Education (DOE) to

provide various services including the collection of debts for the DOE. (Petitioner (Pet.) Appendix (App.) B). The District Court cited Games v. Cavazos, 737 F Supp 1368 (Del 1990) in support of its position that USA Funds was, in effect, "a government actor." However, Games dealt only with a tax intercept letter the content of which was not subject to any discretion by the collector, Games at 1387, and involved "no allegations of abusive or harassing activities, Games at 1388.

Court of Appeals

The Court of Appeals reversed the District Court with regard to the FDCPA claim. (Pet. App. A) The Court of Appeals found that:

1. "The FDCPA does not provide an exemption for guaranty agencies that acquire a student loan after a default in order to pursue its collection." (Pet. App. 4a);

2. "The Secretary of Education has also explicitly stated that GSL third party collectors and their collection activity remain subject to the FDCPA, 55 Fed Reg 40120, 40121 (1990)," (Pet. App. 4a) and;

3. "USA Funds is not a governmental actor exempt from the FDCPA under 15 USC 1692a(6)(C).... This exemption applies only to an individual government official or employee who collects debts as part of his governmental employment responsibility. USA Funds is a private nonprofit corporation with a government contract. It is not a government agency or employee." (Pet. App. 4a-5a).

STATEMENT OF THE CASE

The relevant facts are as set forth in the opinion of the Court of Appeals (Pet. App. at 2a-3a). In summary, those facts are as follows:

1. Brannan obtained a student loan under the former Guaranteed Student Loan (GSL) program established by the Higher Education Act, 20 USC 1071 et seq. (hereinafter "HEA"). USA Funds, a private guaranty agency subject to the HEA and applicable regulations, pursuant to its contracts with the United States Department of Education, guaranteed the loan. The Department of Education, in turn, insured the guaranty agency.

2. Plaintiff received her loan from the Bank of Horton in order to attend Edison Technical College. (Pet. App. 22a) After default by Brannan, and pursuant to its contract with Bank of Horton, USA Funds paid off the loan and began its own collection activity.

3. Brannan filed suit alleging that USA Funds violated the FDCPA by threatening to cause her to lose her job, by communicating with third parties about the debt, and by refusing to communicate about the debt through her attorney.

Additional Relevant Facts Include:

4. USA Funds receives money under its contract with the DOE to provide the services enumerated in the contract.

5. For each of the alleged violations of the FDCPA, USA Funds employed discretion in its written and verbal debt collection communications with Brannan.

6. The regulatory scheme governing USA Funds' student loan collection activity requires only a minimum schedule of contacts, "due diligence" in collection activities, and a generalized requirement to communicate to the debtor the importance of repayment. (Pet. App. 70a - 83a)

7. USA Funds claims that, although it is organized as a nonprofit corporation, it is itself a government actor. USA Funds claims, in effect, a right to engage in various abusive collection techniques otherwise proscribed by the FDCPA because its status as a governmental entity exempts it from the protections provided to consumers under that Act. 15 USC 1692a(6)(c).

REASONS FOR DENYING THE WRIT

Petitioner has failed to establish a compelling basis for this court's review.

1. Petitioner has failed to establish any reviewable conflict between the FDCPA and the HEA. No such conflict exists. Each act promotes important governmental purposes. Each Act must be complied with. Preservation Coalition, Inc. vs. Pierce, 667 F2nd 851, 859 (9th Cir, 1982). That regulations adopted by the DOE pursuant to the HEA are allegedly in conflict with the FDCPA is of no moment. It is axiomatic that a regulation which is contrary to law cannot be enforced. This is true whether the conflict exists between the regulation and another Federal Act, or the Constitution of the United States. Assuming that there is a conflict as a result of the

adoption to the DOE regulation, either the regulation is not enforceable, or Congress must attend to the issue to resolve any perceived or actual conflict.[1]

2. Petitioner has failed to establish any reliable or even supportable basis for its position that the public fisc will be harmed unless USA Funds and other similar entities can engage in abusive or harassing collection activities which violate the FDCPA. Any such potential harm is speculative, the correction of which is a legislative matter. The record is utterly devoid of any facts which would establish that nonabusive collection activities would impact in any way upon the public fisc or the student loan program.

3. No substantial conflict warranting review exists between the DOE regulations and the FDCPA. Petitioner exaggerates[2] and misrepresents the language of

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[1] Congress has taken steps in other areas where conflict between agencies is a natural consequence of the activities of the various agencies. For example, in the environmental arena, the court found in, The Defenders of Wildlife vs Administrator, EPA, 882 F2nd 1294, 1299 (8th Cir 1989), that "Congress has made a conscious decision to give endangered species priority over the 'primary missions' of Federal Agencies." (Citation omitted). Therefore the Environmental Protection Agency (EPA) was required to comply with the Endangered Species Act (ESA) when evaluating the use of a pesticide regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under FIFRA, the EPA must approve an application for registration of a pesticide. In the case at bar, if regulations relating to the collection of student loans by governmental contractors is an issue of such gravity that protection of the FDCPA must be overridden, it is for the legislature to do so, not the courts.

[2] The enumerated conflicts are exaggerated (Pet. at 15-16):

A. Contact with Debtor: Nothing in the DOE regulations prohibits contact with the debtor or the debtor's guardian 15 USC 1692c(d), attorney, or other authorized representative. With permission of the debtor, the FDCPA allows contact with any Third Party. 15 USC 1692c(2). Nothing prohibits such contact at specified intervals unless the debtor notifies the collector in writing to cease further communication. Even then, some communication is allowed. 15 USC 1692c(C).

B. Locating the Debtor: Diligent effort to locate the debtor through an employer is allowed, and repeated contact is allowed where the information previously received is reasonably believed to be erroneous or incomplete, and that person contacted now has completed or corrected location information. 15 USC 1692b(3). No policy

the regulations in an apparent attempt to create conflicts that do not, in reality, exist. Two examples of misrepresentations are:

(1) The representation that the regulations require "direct" communication with borrowers that is prohibited by the FDCPA prohibits. (Pet. at 15). Petitioner cites only the opinion of the District Court with regard to the use of the word "direct". This is a misrepresentation of the language of the regulations. In fact, there is no use in the regulations of the word "direct" in relation to these communications.

(2) The representation that "the HEA regulations require that an agency inform a borrower soon after default that it 'will' pursue civil suit if repayment is not forthcoming." (Emphasis Added) (Pet. at 16). However, review of the regulatory provisions cited by Petitioner, (Pet. App. 67a, 69a-70a), require only that the word "may" is to be used in informing the debtor that civil suit is a potential outcome of the collection activity.

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should encourage repeated Third Party contact without some basis for believing it would lead to additional information.

C. Garnishment: While the FDCPA allows post judgment contact with Third Parties to serve process or effectuate a judicial remedy, 15 USC 1692a(6)(D) and c(b), the non-judicial garnishment may technically conflict with the FDCPA if done by USA Funds. This minor point arises out of recent regulations which ought to have considered potential conflicts. The matter is easily remedied. The DOE may issue the garnishments just as the IRS issues tax intercepts. Alternatively, the matter might be considered by the legislature.

D. Due Diligence: The use of this term carries with it no substance. (Pet. App 70a to 83a). It is an intangible. Its use is similar to a demand that a mechanic meet deadlines, or the urging of a child to "play hard." The actual content of the work or play is left to the actor. In requiring due diligence from its contractor, the DOE does little more than direct when contact with a debtor should occur.

No amount of rewording or exaggeration of harms should allow an interpretation of the DOE regulations to be read to allow tortious conduct, or allow an unelected body to threaten social, physical, or economic harm beyond what can and will legitimately occur through the collection process.

4. No compelling basis has been raised for dimming the bright line between the government and its functions, and contracting private corporations and their functions. This line was clarified by the decision of the Court of Appeals when it refused to give USA Funds government standing. In this case, to give the Petitioner governmental status would be to render that corporation without accountability for its actions (there is no private right of action under the HEA (Pet. at 21)). USA Funds used discretion in each of its verbal and written communications with Brannan. It uses discretion in virtually all of its communications relating to debt collection. USA Funds is not subject to due process nor equal protection requirements. It would be a mistake for this court to expand the area of interplay between government and private business through the medium of the fiction of a "government actor."[3]

5. The DOE and Fair Trade Commission, in the communications cited by, Petitioner, contend only that the FDCPA does not apply to guaranty agencies collecting student loans in their "own names." This dispute concerns whether a GSL guaranty agency which is paid to collect a debt for the Secretary of the DOE after a post default

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[3] A contractor is a contractor. This court has determined that under some circumstances, a contractor may have qualified immunity from state tort claims. Boyle v. United Technologies Corp., 487 US 500, 101 2nd Ed 442, 108 S Ct 2510 (1985). However, this Petition does not involve state claims, nor does it involve the type of government control over the contractor, and awareness of product faults required under such a theory.

acquisition of the debt, is collecting its own debt. This issue is not appropriate for review because it is:

(1) Fact intensive because the circumstances of the loan may affect the conclusion; and,

(2) Is an issue that has not been developed by the lower courts.

6. Regarding the applicability of the FDCPA to guaranty agencies there is no conflict with the 9th Circuit Opinion and any other Circuit Court of Appeals. Further, there is no conflict between the 9th Circuit Opinion and a decision by the highest court of any state.[4] In the absence of such conflict, Supreme Court review is unwarranted.

7. In construing that FDCPA, the Court of Appeals held that "where a statute (15 USC 1692a(6)(C)) names the parties that come within its provisions, other unnamed parties are excluded," (citations omitted) (Pet. App. at 4a). No private contractor is named in the exclusion, only government officers and employees of the United States or any State are named. Although USA Funds urges the court to treat it like a State, it simply is not a political body.[5]

In this case, both the HEA and FDCPA have been amended and modified on numerous occasions. (Pet. at 5) Even the exemption provision of the FDCPA has been amended, but never to include as an exempt entity contractors with the government who

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[4] In the case cited by the Petitioner Fisher v. Unipac Service Corp., 519 NW 2nd 793 (Iowa 1994), the Iowa Supreme Court relied on the applicability of the FDCPA to a company which gained an interest in a debt prior to the debt being in default. Based on that fact, the Court found that the FDCPA did not apply. Fisher at 799.

[5] The term "State means any State, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing." 15 USC 1692a(8).

collect on student loans.[6] Petitioner provides no substantial challenge to the statutory construction employed by the Court of Appeals resulting in the reversal of the District Court decision. The further interpretation of the intent of the Legislature is not appropriate for review.

8. The arguement that USA Funds is a "creditor" not subject to the FDCPA under 15 USC 1692a(4) (Pet. at 23) was not properly raised below, and is not appropriate for review.[7]

CONCLUSION

United Student Student Aid Funds, Inc.'s Petition for a Writ of Certiorari should be denied.

DATED this 28th day of May, 1997.

Respectfully Submitted,

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[6] Public law 99-361, 100 stat. 768 (July 9, 1986) repealed the provision in 15 USC 1692a(6)(f) which provided a limited exemption for attorneys.

[7] "USA Funds concedes for the purposes of this appeal that it is a 'debt collector' under 15 USC 1692a(6)." (Opinion of Court of Appeals, Pet. App 4a).